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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 511

PUEBLO OF SANTA ROSA, PETITIONER

v.

ALBERT B. FALL, SECRETARY OF THE INTERIOR, AND William Spry, Commissioner of the General Land Office

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of the District of Columbia, not yet reported, is found at page 423 of the record. The opinion of the Supreme Court of the District of Columbia is found at page 90 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1926. (R. 431.) A petition for re-

hearing was entertained and denied April 24, 1926. (R. 441.) Jurisdiction of this Court to issue the writ is found in Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT

Since Albert B. Fall is no longer Secretary of the Interior and the petitioner took no steps in the lower court to substitute his successor, this brief is presented only on behalf of the Commissioner of the General Land Office, the remaining respondent.

The complaint (R. 1) filed January 28, 1915, averred that plaintiff from time immemorial has been a town known by the name of the Pueblo of Santa Rosa; that from time immemorial it has occupied a definite tract of land 24 miles by 30; that under the Spanish and Mexican law it became and is the absolute owner thereof, and that the defendants were offering the land for entry as public land of the United States and should be enjoined from so doing. No written grant was pleaded and the alleged title depends upon the general laws of Spain and Mexico. A motion to dismiss based principally on the ground that the plaintiff had no right or capacity to sue was sustained by the trial court and the bill dismissed. (R. 11–21.) An appeal was taken in 1916 to the Court of Appeals of the District of Columbia, which reversed the trial court and ordered a permanent injunction against the defendants. (*Pueblo of Santa Rosa* v. *Lane*, 46 App., D. C., 411.) An appeal followed to this Court,

which in 1919 reversed both the lower courts and sent the case back with instructions that the defendants be allowed to answer and that the case be tried on the merits. (*Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110.) Up to that point the only thing before the courts was the bill of complaint and this Court held that the allegations of the bill if true showed that the plaintiff was a pueblo with the capacity to sue, and that the bill of complaint showed the Indians had a complete and perfect title. This Court said (p. 114):

> In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the sixth article of the Gadsden Treaty, but no decision on either point is intended.

When the case reached the Supreme Court of the District of Columbia on mandate from this Court on June 9, 1919, the defendants filed an answer (R. 22) denying the allegations of the complaint, and alleging that there was no such entity as the Pueblo of Santa Rosa, but that Santa Rosa is merely a geographic name describing a large district of indefinite extent, containing various scattered Indian villages; that neither the alleged village nor any Papago village has fee title to the land it occupies or anything but the ordinary In-

dian occupancy title, which title under the Papagos' own theory belongs to the whole tribe. The answer alleged that the tract described in the complaint, considered as an ascertainable tract claimed or occupied by any Papago village, is a myth; that its boundaries are incapable of accurate ascertainment; that no Papago village as such claims any definite tract of land; that the description in the complaint was taken from one of the various sixteen deeds given by various Papago chiefs in 1880 to one Hunter, Trustee, each purporting to convey one-half interest in a tract of land assumed by the draftsman of the deed to represent the property of the village or group of villages. (R. 31.)

The answer also denied that the defendants were attempting to deprive the Indians of any interest in the land and alleged that the United States was protecting the Indians in the occupation of the district and had created reservations for that purpose.

The answer also alleged that the so-called Pueblo of Santa Rosa had never authorized the suit and that counsel who appeared for it had no authority to represent it, if there were such a pueblo.

Simultaneously with the filing of the answer the defendants filed a motion to dismiss (R. 33), accompanied by affidavits, alleging want of authority from the Indians to institute the suit and the invalidity of a certain power of attorney given on the same date as the deed of 1880, which was the basis

of the authority claimed by counsel for instituting the suit in the name of "Pueblo of Santa Rosa." It was set forth in the motion papers that the Solicitor General first learned of this want of authority while the case was in this Court. This motion was presented to the trial Court, but on February 28, 1921, the Supreme Court of the District of Columbia filed a memorandum (R. 87) expressing the view that it would be better to have this point disposed of at the hearing on the merits, saying: "The decision of the motion to dismiss will be postponed until the final hearing of the cause and an order to this effect will be signed on notice and presentation." (R. 89.) Thereafter the case was tried on the merits.

The decision of the Supreme Court of the District of Columbia was filed May 22, 1924 (R. 90), ordering the dismissal of the bill. The Supreme Court of the District assumed "but without deciding" that the plaintiff is a pueblo or municipality and assumed "but without deciding" that it owned and held the lands in suit exclusively for its own benefit. It held that the evidence showed that the pueblo had never authorized the suit and that counsel had no authority to conduct the suit in its name. The trial court made no findings of fact bearing on the question whether there is a Pueblo of Santa Rosa. On appeal to the Court of Appeals of the District the decree of dismissal was affirmed. The Court of Appeals, however, seems to have concluded that there is a municipality

" Pueblo of Santa Rosa." Its opinion refers, not so much to the evidence in the record, as to matters it took judicial notice of on the former appeal, and which this Court evidently considered insufficient. It decided that the questioning of the authority for the institution of the suit was " not only improperly injected into the present case, but it came too late " (R. 428), and then decided that Article 6 of the Gadsden Treaty, to the effect that no " grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico," operated to defeat the suit because it did not appear that the grant in question had ever been located or duly recorded.

In determining whether a writ of certiorari should issue this Court may consider not only the ground on which the Court of Appeals decided the case, but any other grounds which would be open to this Court to consider on the record which would justify the affirmance of the judgment below.

In addition to the point arising under the Gadsden Treaty the respondent contends that the so-called pueblo never authorized this suit and that the objection on that ground was made seasonably and in the proper way; that the evidence shows that there is no Pueblo of Santa Rosa and that there was a complete failure of proof that the respondents were attempting in any way to deprive the Papago Indians of any interest in the district where they lived; and that instead of opening these lands to

entry, the United States had set them aside as reservations for the Papago Indians.

No Indians are back of this suit. No Papago Indian community in Arizona has authorized or ratified it. When informed by the Government of its pendency, the Papago Indians repudiated it and petitioned the trial court for its dismissal. (R. 404–5; 407–8.)

Under date of December 8, 1880, a person describing himself as "Luis, Captain of the Village or Pueblo of Santa Rosa, in the Territory of Arizona" undertook for himself and the inhabitants of the village and certain other villages to convey to one Robert F. Hunter the undivided half of lands alleged in the conveyance to be owned by the said villages of Santa Rosa and described in the deed as containing some 720 square miles. At the time this deed was given Luis signed a power of attorney under which he undertook to appoint Hunter "our true and lawful attorney, to represent and prosecute in our names, or the names of the said inhabitants of said village before the Government of the United States" claims for grants of tracts of land situated in said territory. The power contained a provision that as it "is accompanied with an interest vesting in our said Attorney, for a valuable consideration, it is hereby made irrevocable." (R. 94–5.) Hunter made some sporadic attempts before the Interior Department to have the rights of the Papagos recognized as a fee title, but the Secretary of the Interior held that

it was a mere right of occupancy (R. 245), and little or nothing was done under these deeds or power of attorney until nearly thirty years later when Hunter entered into an agreement with one R. M. Martin, of Los Angeles, by which the latter undertook to prosecute proceedings to have the Indian title acknowledged and a partition between the Indians and Hunter and Martin of the undivided half interest conveyed by the deed.

At the time of getting the deed and power forming the foundation for this suit, Hunter secured sixteen other conveyances from various Indian chiefs for an undivided half interest in approximately 2,000,000 acres of land constituting nearly one-half of the Gadsden Purchase. None of these deeds were even recorded until June 2, 1914, some thirty-three years after their execution. The chiefs are dead, and Hunter, the donee of the power, is dead. The Papago Indians whose testimony was taken, some of whom were living at the time of these alleged conveyances, never heard of them and the substance of their testimony was that there had been no consultation with the members of the tribe about the deeds and the chiefs had no authority to make them.

The circumstances under which the deeds were given are described by Ainsa, the notary, and the only survivor of those present. (R. 276–298.) None of the Indian chiefs present could read or write or speak English. The documents were in English but the interpreter could not read them.

A chief called Con Quien signed nine of the seventeen deeds, assuming, or being made by the managers of the puppet show to appear to assume authority to act in place of eight absent chiefs. There is nothing to suggest that any chief had any authority to convey the interest of the tribe in any lands.

Martin is shown to be the real party in interest, who has caused the institution of this suit in the name of the alleged Pueblo of Santa Rosa without any authority whatsoever except that claimed to be derived from the power of attorney made in 1880, above described. It is evident that the purpose of the suit is to enable Martin and others to whom he has sold "chances" on the successful outcome of this litigation to profit by acquiring title to one-half of the land occupied by the Indians, and that the suit is not in the interest of the Indians but directly opposed to their interests.

The evidence showed that the Government has made no attempt to deprive these Indians of any interest in these lands but on the contrary it has carefully protected and assisted them. The position of the United States and its authorities has been that these lands are public lands of the United States subject to Indian occupancy and possession, a right which has been carefully guarded. Government agents have supervised the affairs of the Papagos since 1858. Appropriations for Arizona Indians to assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life and for general purposes have been

made annually from 1864 to the present time in ever-increasing amounts. (13 Stat. 180, 559; 14 Stat. 279, 512; 15 Stat. 219; 35 Stat. 75, 786; 36 Stat. 272, 1062; 41 Stat. 1232.)

In 1912, 1913, and 1914 appropriations were made for the development of water supply for domestic and stock purposes and "for irrigation for *nomadic* Papago Indians in Pima County, Arizona." In 1914 the sum of $50,000 was appropriated for Papago schools. (38 Stat. 584.) A hospital is maintained at Sells. In each of the years 1914, 1916, 1917, and 1918 the sum of $20,000 was appropriated for pumping plants, tanks, and water supply for eight Papago villages. In 1919 the sum of $10,000 was appropriated to fence the boundary between the main Papago reservation and Mexico (40 Stat. 569), and $52,000 for maintaining waterworks and constructing new wells at seven more villages (41 Stat. 10). Many other appropriations for similar purposes were made between 1874 and 1912; seven reservations were created for the Papagos by Executive order (R. 20), and in 1916 a reservation of about 2,800,000 acres was set apart (R. 28). In 1917 this was reduced on petition of the Arizona Legislature and other bodies to 2,443,000 acres by taking out a strip from East to West through the center in order to leave a passage for persons and cattle. This reservation was made on the petition of the Papagos themselves and now covers most of the Papago country. Almost all of the Indian occupancy is

therefore protected by the reservation and any part lying within the withdrawn strip is protected by the general rule announced by the Department of the Interior to grant no titles to public lands in Indian occupancy. (R. 271, 274.)

A large amount of testimony was taken bearing on the question whether the Papago villages are pueblos or municipal entities. Testimony discloses that the Papagos live in an arid country in which the only permanent sources of water are in or near the foothills of small mountain ranges; that they both farm and raise livestock under conditions which require them in the winter to occupy villages in the foothills where there is a permanent water supply for their stock, and in the summer to move to small villages in the valleys where they have fields which they cultivate. Adobe houses are matters of recent development among the Papagos; their huts have been usually of poles and grass. No village has any defined or corporate limits. Papago Indians claim individual ownership only of the small fields which they use for cultivation and the broad range of additional area is occupied by the Papago Nation or Tribe. It is open for use by any and all Papagos. No one village claims any definite portion of this area and cattle belonging to members of all villages roam indiscriminately over it. Witnesses stated that there was no single village or "Pueblo" of Santa Rosa, but that the name Santa Rosa was used by the Indians in conversing with persons not Indians when re-

ferring to any one of several villages clustered together over an area of 5 to 8 square miles in the Santa Rosa valley. These villages, which are four in number, are summer villages of the Papagos. The Indian names for the villages are Kaicheemuch, Achi, Akchin, and Anegam. The district occupied by the Papagos has not been sharply defined and the description used in the bill of complaint seems to have originated in the deed to Hunter.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONSTRUED THE GADSDEN TREATY AND THERE ARE ADDITIONAL REASONS DISCLOSED WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

Article 6 of the Gadsden Treaty, so far as relevant, reads:

> No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to * * * [September 25, 1853] * * * will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico. (10 Stat. 1031, 1035.)

Assuming that plaintiff is a pueblo with the capacity to sue, and that the suit was brought with its authority and that it had acquired an interest in the lands in question which were "subject to recognition by the Government of Mexico," as the Court of Appeals said, it will be conceded that no proceed-

ings were ever instituted during the period of Spanish or Mexican sovereignty to have the title established or made a matter of record. It seems clear that Article 6 of the Gadsden Treaty covered a case of this kind. The word " grant " as used in the Treaty is not limited to rights acquired by written deeds. In *Strother* v. *Lucas,* 12 Pet. 410, 436, it was said:

> This Court has also uniformly held that the term grant, in a treaty, comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession * * *.

In the case of *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. at page 112, the Court referring to a law of the Territory of New Mexico, said:

> * * * One of those laws provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such lands

—a statement indicating that a right such as is here claimed is a grant or concession within the meaning of the Gadsden Treaty. There is every reason why Article 6 of the Gadsden Treaty should be construed to apply to a case of this kind. If the Treaty requires the rejection of a regular written title evidenced by deed unless the claim has been located and recorded, it certainly requires

the rejection of a parol or possessory title where clear identification on the ground is essential to show the exact limits of possession, and because the absence of a survey and location of boundaries proves that the Governments of Spain and Mexico had never recognized the claim as valid.

But there are obviously other reasons for refusing the petition for certiorari. Assuming that there is a Pueblo of Santa Rosa, the findings made by the trial court show conclusively that Martin's authority for instituting the suit in the name of the Pueblo was derived entirely from the power of attorney and deed made by Chief Luis in 1880; that the power has lapsed through the death of the donee unless a valid power coupled with an interest, and that the interest relied on to keep the power alive is the attempted conveyance by Chief Luis to Hunter of an undivided half of the Indian lands, a conveyance which the record shows was wholly unauthorized, without any right or authority. The Court of Appeals was evidently acting under a misapprehension in stating that the objection to the authority came too late when presented at the trial on the merits. It was presented by motion at the time the answer was filed and then insisted on, and only deferred by the trial court. The law is in a strange state if it is ever too late in the progress of litigation to procure the dismissal of a suit upon conclusive evidence that the suit was brought in the name of one who had

not authorized it, and who does not want it prosecuted, and that the successful prosecution of the suit would result to the detriment and loss of the one in whose name it is being prosecuted, and the purpose of the one responsible for the litigation is to line his own pockets at the expense of the one whose name he is using.

There is in addition the point that there is no Pueblo of Santa Rosa with capacity to sue. Lacking findings of the trial court on this question, we may only refer to the evidence in the transcript which we are confident supports the view that the Papagos present an entirely different picture than the Pueblos of New Mexico. The established policy of the United States for more than half a century has been to treat the Papagos as seminomadic with no definite title to any definite tracts of lands, but with mere Indian right of occupancy, and the Papagos themselves have acquiesced in this treatment and have benefited by it.

The Papago Indians will not be bound by the judgment which has been rendered in this case. The very evidence which the respondent relies on to show want of authority for the maintenance of this suit would enable the Papagos in their turn, if they ever see fit so to do, to relitigate any question involved in this case free from the claim of *res adjudicata.* Whether Santa Rosa is a pueblo with a capacity to sue and whether the pueblo has a title to definite tracts of land unaffected by

Article 6 of the Gadsden Treaty are questions which, if they are to be decided by this Court, should be considered in a case instituted for the Papagos under their authority and with their consent.

The petition for certiorari should be denied.

Respectfully submitted.

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D. V. HUNTER,
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AUGUST, 1926.

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